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No. 80-1341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AARON CLINTON ATKINS,
Petitioner,

v

MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS CAN GRANT A LESS DRASTIC REMEDY THAN DISMISSAL WHERE THE COURT OF APPEALS HAS DETERMINED JUDICIALLY THAT THE PETITIONER HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

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AARON CLINTON ATKINS,
Petitioner,
v
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, AARON CLINTON ATKINS, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 2, 1981.

ORDER BELOW

The Opinion of the Court of Appeals of March 2, 1981 is set forth in Appendix A.

JURISDICTION

On March 2, 1981, the Court of Appeals for the Sixth Circuit entered Judgment affirming in Part and Reversing in Part the District Court's Judgment with respect to Petitioner. The Court of Appeals affirmed the District Court's finding that Petitioner had been denied his right to a speedy trial under the Sixth Amendment to the United States Constitution. The Court of Appeals reversed the District Court's order of dismissal and gave the prosecution sixty (60) days in which to bring the defendant to trial or to dismiss the case. This Petition for Certiorari is being filed within the specified time period. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254 (1) (2) (3) (4) (5).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in part, that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

STATEMENT OF THE CASE

On January 22, 1979, Aaron Clinton Atkins voluntarily presented himself, with his attorney, for arraignment on a charge of first-degree murder which had been brought against him by the People of the State of Michigan. A Magistrate of the Recorder's Court for the City of Detroit

arraigned Mr. Atkins on January 22, 1979, on the charge of the murder of one Girard Tolbert, who had been found by the Wayne County Medical Examiner to have died of a drug overdose in 1974. The Magistrate remanded Mr. Atkins without bond to the Wayne County Jail. The following date, Recorder's Court Judge Dalton Roberson set a fifty thousand dollar ($50,000.00) two surety bond on motion of Mr. Atkins' attorney. Although the people alleged in their brief that the order was contrary to Michigan law, no appeal was taken. Mr. Atkins preliminary examination, for which he again voluntarily presented himself, was held by Judge Clarice Jobes on January 31, 1979. At that time, Mr. Atkins was bound over and again remanded to the Wayne County Jail without bond. On February 6, 1979, the trial Judge to whom the case was assigned, Judge Evelyn Cooper, reinstated the bond previously set by Judge Roberson, and that same day, the Wayne County Prosecutor on behalf of the People of Michigan, filed an emergency application for leave to appeal in the Michigan Court of Appeals. Within three days, on February 9, 1979, and without the benefit of a transcript of the Recorder's Court Hearing as required by the Michigan General Court Rules, the Michigan Court of Appeals issued a summary order granting immediate leave to appeal and ruling:

> "It is further ordered that the bond set by the trial court in this cause be, and the same is hereby, ordered cancelled (sr) and the Defendant is hereby ordered remanded to the Wayne County Jail."

No findings of either an abuse of discretion or of any other matters were made.

Aaron Atkins voluntarily surrendered himself again after this bond cancellation. A trial date was set for April 5, 1979, and a series of pretrial evidentiary motions were heard in the interim. On the date of trial, when the jury selection process was to commence, the Wayne County Prosecutor filed and served a written motion requesting that the court rule upon the admissibility of the "similar acts" testimony of a previously endorsed witness, Levi Williams. Despite the objections of defense counsel that the motion cut-off date had passed, that the requisite four-day notice had not been given and that the motion raised questions which could be resolved in the course of the trial, the trial Judge adjourned the trial and took the motion under advisement. On May 14, 1979, the trial Judge denied the prosecution's motion and set a new trial date of May 30, 1979. However, on May 18, 1979, the People filed an emergency application for leave to appeal the trial Judge's ruling. On May 24, 1979, the Court of Appeals granted the prosecution's motion for immediate consideration of the interlocutory appeal, granted a stay of trial pending appeal, and halved the time in which the parties were to file their briefs. As with the first Court of Appeals order, no grounds for the order were stated. The matter was, however, not treated on an expeditious basis by the Court of Appeals.

On August 30, 1979, Judge Cooper heard arguments on Mr. Atkins motion to dismiss for denial of his right to a speedy trial. She denied that request, but made findings on the record that circumstances had changed since the Court of Appeals cancellation of bond on February 9, 1979, and for stated reasons including Mr. Atkins' history of three voluntary surrenders during the pendency of the charges, and that he had been incarcerated for more than six months, ordered a fifty thousand dollar ($50,000.00) ten-percent (10%) bond.

Mr. Atkins was free on the fifty thousand dollar ($50,000.00) ten-percent (10%) surety bond set by Judge Cooper from August 30, 1979 until September 12, 1979, when the Court of Appeals again issued a summary order cancelling bond and remanding him to the Wayne County Jail. Mr. Atkins again surrendered himself voluntarily. The Court of Appeals again made its decision without a transcript as required by law and made no findings as to an abuse of discretion by the trial Judge, or any other pertinent factors. The Court merely granted immediate consideration, and emergency application for leave to appeal, and stated:

> "It is further ordered that the order of the trial judge setting bond be, and is hereby set aside and the bond cancelled. Defendant is ordered remanded to the custody of the Wayne County Sheriff, pursuant to this Court's order of February 9, 1979."

After his fourth voluntary surrender, Mr. Atkins filed an emergency application for leave to appeal to the Supreme Court of Michigan, which was denied on November 2, 1979, with the following statement:

> "The emergency application for leave to appeal is denied, because the Court is not persuaded that the questions presented should be reviewed by this Court."

On November 19, 1979, Mr. Atkins filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. On April 7, 1980, a show cause hearing was held before United States District Judge Anna Diggs Taylor and petitioner's counsel argued the merits of their claims. Judge Taylor adjourned arguments until April 14, 1980, so that the

respondent could prepare a response. Upon completion of respondent's arguments, Judge Taylor informed the parties that she would issue her opinion on April 15, 1980. On April 15, 1980, Judge Taylor granted petitioner's relief and found that petitioner had been denied his right to a speedy trial.

On April 18, 1980, the People appealed the District Court's ruling to the United States Court of Appeals for the Sixth Circuit. On March 2, 1981, the Court of Appeals issued its opinion affirming in part and reversing in part the District Court's findings.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Inconsistent With The Decisions Of This Court And Other Circuits Dealing With Violation Of A Defendant's Sixth Amendment Right To A Speedy Trial

The Court of Appeals opinion does not in context reverse the District Court decision. In fact, it totally agrees with the District Court's finding except that the District Court's remedy for denial of a speedy trial violation is consistent with that of the United States Supreme Court, whereas the Court of Appeals' remedy is totally inconsistent with the remedy mandated by the United States Supreme Court. The Court of Appeals tries to justify their decision on the theory that the District Court failed to address or consider the exhaustion of state remedies question. The Court states at (Tr. pg. 7):

> "The district Court treated the petition as requesting dismissal and, without consideration of the exhaustion question, proceeded to an analysis in light of the Baker criteria."

This must have been an oversight on the part of the Court of Appeals because at (Tr. pg. 15) of the District Court's opinion, Judge Taylor addresses the question of Petitioner's exhaustion of state remedies by stating:

> "This Defendant, Petitioner Atkins', assertion of his right to a speedy trial began with his objection to the People's untimely and unnecessary pretrial motion on the day of his scheduled trial, April 5, 1979, and has continued unflaggingly throughout this period. Petitioner's motion to dismiss for denial of speedy trial was denied by Judge Cooper in August, 1979, and although her new bail order was reversed, her refusal to dismiss was left undisturbed by the Court of Appeals' September Order, and by the Supreme Court of Michigan's rejection of Atkins' appeal in November.

If this Court will take note, not only was the Court of Appeals mistaken in its assertion that the District Court failed to address the exhaustion of state remedies question, but if this Court will note at (Tr. pg. 8) the Court of Appeals admits that Mr. Atkins exhausted all available state remedies and in its findings uses basically that same language as that of the District Court in its findings for its determination, by stating:

> "We find that Atkins diligently presented this constitutional claim in state court prior to his petition for habeas corpus and that therefore, he exhausted his available state remedies. In August, 1979, he moved the trial court to dismiss the indictment on speedy trial grounds or to release him on bail pending trial. At that point, the trial court, of course, had not the authority to order the prompt trial of Atkins in order to enforce the

> state's constitutional duty to do so, because at that time the state Court of Appeals was considering the prosecution's interlocutory appeal and could not be ordered by a trial court to speed up its process. When the Court of Appeals, however, considered the prosecution's appeal of the trial court's release of Atkins on bail and when the Michigan Supreme Court decided whether to permit Atkins to appeal the revocation of bail, both Courts had the opportunity to consider and were confronted by the specific argument, cite omitted, that the state was violating its duty to grant Atkins a prompt trial. After the State Supreme Court denied Atkins leave to appeal, no state avenue remained open to him to press his claim. Application for a writ of habeas corpus in this situation to consider whether the state violated its duty is proper, cite omitted."

As this Court can see, the Court of Appeals' assertion that the District Court failed to address itself to the exhaustion question is totally erroneous. Not only does the District Court address the question and reach the proper conclusion, the Court of Appeals addresses itself to the question and uses basically the same language as that of the District Court, in its determination that the Petitioner had exhausted all available state remedies.

The next question addressed by the Court of Appeals opinion is the issue of the reasonableness of the state delay in bringing Petitioner to trial. Again I ask this Court to note the basic similarity in the language used and conclusions reached by the District Court and the Court of Appeals. The District Court states:

> "The reason for the delay includes approximately four months prior to the initial trial date of April 5, 1978, which were spent in pretrial motions, and which is permissible delay. However,

> approximately eleven months since May 18, 1979, have been consumed by the Michigan Court of Appeals interlocutory consideration of the People's emergency appeal. This delay is impermissibly in derogation of Petitioner's right to a speedy trial.
>
> Accordingly, this Court finds the interlocutory appeal to have been an overlong delay, and an intrusion upon Atkin's constitutional right to a speedy trial." (Tr. 14 - 15).

The Court of Appeals addresses the unreasonable delay question in the following manner:

> "The eleven month pretrial delay following the appeal, however, is unexplained. In a similar situation both the Michigan Supreme Court and the Federal District Court for the Western District of Michigan have expressed the view that a violation of the right to a speedy trial can arise from the consumption of an excessive amount of time by the Appeals Court considering an interlocutory appeal. *People* v *Chism*, 390 Mich 104, 113, 211 NW 2d 193 (1973); *Chism* v *Koehler*, 392 F Supp 659 (W.D. Mich, 1975) aff'd, 527 F 2d 612 (6th Cir) cert denied, 425 U.S. 944 (1976). In the present case, we find that the time spent on appeal, when added to the previous four months delay, resulted in a violation of the duty of the state to bring Atkins promptly to trial."

In comparing both the District Court and the Sixth Circuit Court's opinions, it is evident that the language used is basically the same, but most important is the fact that the conclusions reached are exactly the same. Both courts agreed that Petitioner, Atkins, had been denied

his constitutional rights to a speedy trial. Thus, the Court of Appeals affirmed this portion of the District Court's Order.

The only difference in the two opinions is the remedy which followed their respective opinions. The District Court chose to follow the guidelines and mandate laid down by the U.S. Supreme Court in *Barker* v *Wingo*, 407 U.S. 514 (1972), and the opinion of Chief Justice Burger in *Strunk* v *United States*, 12 U.S. 434 (1973):

> "It is true that Barker described dismissal of an indictment for denial of a speedy trial as an 'unsatisfactorily severe remedy.' Indeed, in practice, it means that a defendant who may be guilty of a serious crime may go free, without having been tried." 407 U.S. 522. But such severe remedies are not unique in the application of constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain, as Barker noted, 'the only possible remedy.' " Ibid.

The District Court followed the standards and the mandates laid down by the United States Supreme Court in both the *Barker* and *Strunk* cases, thus the only possible remedy left for the Court of Appeals to give once they had determined that Petitioner Atkins' rights to a speedy trial had been violated was to dismiss the charges against him. The Sixth Circuit Court, however, even though they reached the same conclusion that the District Court had reached namely that Mr. Atkins' right to a speedy trial had been denied, chose to fashion a remedy not cognizable by this Honorable body.

> "Because of a violation of the duty to try Atkins promptly had been found, however, we are

constrained to order that his trial commence within sixty days, to guarantee that no further infringement of his right to a trial occur." (Tr 10-10A).

The Court of Appeals has refused to acknowledge the mandates of the United States Supreme Court as laid down in the *Barker* and *Strunk* cases, namely once it has been judicially determined that a Defendant has been denied his rights to a speedy trial, *the only remedy is dismissal*. There is no authority to grant the violating party sixty more days to bring the Defendant to trial. In essence, what the Court of Appeals is doing is not reversing the District Court, *what they are actually doing is reversing the United States Supreme Court, which is totally outside of the realm of their jurisdiction*.

It is interesting and somewhat baffling to note the decision of the Court of Appeals makes no mention of Strunk. Unquestionally, the Strunk case, which is analagous in all respects to the instant case, must be controlling. The facts before the U.S. Supreme Court dealt with a 10 month delay prior to the defendant being brought to trial. Upon review, the Court of Appeals found this period of time to constitute a denial of the petitioner's right to a speedy trial. Having thus judicially determined that his constitutional right to a speedy trial had occurred, the Court of Appeals sought to fashion a remedy other than dismissal as mandated by *Barker* v *Wingo*. Again, it should be noted that the Court of Appeals in the instant case made the precise same judicial determination. In the *Strunk* case, the Court of Appeals attempted to modify the sentence that had been handed down, by making it shorter. The United States Supreme Court, with Chief Justice Burger speaking for a unanimous court, reversed the judgment of conviction

and ordered the Court of Appeals to direct the District Court to set aside its judgment, vacate the sentence and dismiss the indictment.

In light of *Strunk*, it is difficult to fathom how the Court of Appeals in the instant case could ignore completely the obvious applicability of that case. There is no authority for the Court of Appeals to permit the prosecution an additional 60 days or then dismiss the information and charges. Such a ruling by the Court of Appeals violates not only the letter of the law, but the spirit as well. The language from *Strunk* cited herein previously sets forth with definitiveness and finality what must be the only possible remedy when denial of a speedy trial has taken place. The Court of Appeals here, as in *Strunk*, sought to grant less drastic relief than dismissal. The United States Supreme Court, with unanimity, has spoken to this issue, and their position is clear; dismissal is the remedy, not administering a lesser sentence or granting an additional 60 days to try a person or then face dismissal.

What is before this Honorable Body is the classic case of an Appeals Court attempting to circumvent a well established principle, by carving out an exception thereto. There is no rationale for providing an additional 60 day period in which to try Atkins and then requiring a dismissal should the prosecution fail to go forth. It is impossible for the Court of Appeals to hold, as they did, that Atkins had been deprived of his right to a speedy trial and then conclude that in spite of this constitutional denial, another 60 days would not hurt. If such a holding were permitted to stand, it would be an anomaly in the law, with the Sixth Circuit Court of Appeals standing in defiance of the U.S. Supreme Court.

CONCLUSION

For the reasons contained herein, Petitioner, Aaron Atkins, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit or that the alternative, that the United States Supreme Court issue a peremptory order reversing the Court of Appeals and reinstating the District Court's Judgment as being the law of the case.

Respectfully submitted,

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Dated: April 20, 1981

APPENDIX "A"

OPINION

(United States Court of Appeals
for the Sixth Circuit)

(Decided and Filed March 2, 1981)

Aaron Clinton Atkins, Petitioner-Appellee, v. People of the State of Michigan (William L. Cahalan, Wayne County Prosecuting Attorney and William Lucas, Wayne County Sheriff), Respondent-Appellant.

On Appeal from the United States District Court for the Eastern District of Michigan.

Before: Merritt and Brown, Circuit Judges; Phillips, Senior Circuit Judge.

Merritt, Circuit Judge. The state of Michigan appeals the District Court's grant of Atkins' petition for a writ of habeas corpus dismissing his state-court murder indictment on grounds that the state violated his sixth amendment right to a speedy trial and violated the fourteenth amendment in denying him bail. In January 1979 Atkins was arrested on the charge of first degree murder. He was released on bond by a judge of the Recorders Court in Detroit but later was remanded to jail without bond by an examining magistrate. Judge Evelyn Cooper, the trial judge, on February 6, 1979, reinstated the bond originally set, stating that neither she nor the examining magistrate had jurisdiction to disturb the bond. The state immediately applied for emergency leave to appeal this decision. On February 9, in a peremptory order, the state Court of Appeals cancelled the bond and

remanded Atkins to jail without a statement of reasons. Atkins' application to appeal this ruling to the Michigan Supreme Court was denied, and he returned to jail to await trial.

The parties filed several pretrial motions, including one by a co-defendant for suppression of evidence and one by the state, brought on the date set for trial (April 5, 1979), requesting a pretrial ruling on the admissibility of evidence. The trial was postponed. On May 14 the trial court ruled against the state on the suppression motion and the prosecution's evidentiary motion and set a trial date for May 30. The prosecution again perfected an emergency appeal and moved for a stay of proceedings on May 18. The Michigan Court of Appeals agreed to hear the appeal in an expidited fashion. Oral argument was held in October 1979, when the court first returned to session, but no decision was rendered until April 16, 1980, when the trial judge's ruling was affirmed in part and reversed in part. The state's application to appeal was denied by the state Supreme Court.

Meanwhile, in August 1979, when the case was pending before the state Court of Appeals, Atkins moved the trial court to dismiss the action because his right to a speedy trial had been denied, or in the alternative to release him on bail pending trial. The court denied the morion to dismiss, but, finding that circumstances had changed since the state Court of Appeals cancelled bond in February, it ordered his release on a $50,000 bond. This was appealed by the state in an emergency fashion, and on September 12, 1979, the Court of Appeals again cancelled the bond and remanded Atkins to jail. Its decision stated simply,

> It is . . . ordered that the order of the trial judge setting bond be, and is hereby set aside and the

> bond cancelled. Defendant is ordered remanded to the custody on the Wayne County Sheriff, pursuant to this court's order of February 9, 1979.

Atkins' request to appeal was denied by the state Supreme Court. He then filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, on November 19, 1979, requesting that the district court order either that the case be dismissed or that trial commence immediately or that the bond set by the trial court be reinstated. On April 15, 1980, the district court issued an opinion granting the writ and ordering the dismissal of the case against petitioner and his release from custody. The state appealed to this court. We affirm in part and reverse in part.

I.

A.

We consider first whether the speedy trial claim may be entertained prior to a trial on the indictment brought by the state against Atkins.[1] A body of case law has developed holding that although § 2241 establishes jurisdiction in the federal courts to consider pretrial habeas corpus petitions, the courts should abstain from the exercise of that jurisdiction if the issues raised in the

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[1] Atkins' petition under § 2254 was improper, because that section applies only in post-trial situations, affording relief to a petitioner "in custody pursuant to the judgment of a State court." 28 U.S.C. § 2254(a). Pretrial petitions such as Atkins' are properly brought under § 2241, which applies to persons in custody regardless of whether final judgment has been rendered and regardless of the present status of the case pending against him. For a discussion of the distinction between post-trial habeas corpus relief under § 2254 and pretrial under § 2241, see Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 503-04 (1973) (Rehnquest, J. dissenting), and Moore v. DeYoung, 515 F.2d 437, 441-42 (3d Cir. 1975).

petition may be resolved either by trial on the merits in the state courts or by other state procedures available to the petitioner. *See, e.g., Ex parte Royall*, 117 U.S. 241 (1886); *Fay* v. *Noia*, 372 U.S. 391, 417-20 (1963); *Braden, supra; Moore* v. *DeYoung, supra; Brown* v. *Estelle*, 530 F.2d 1280 (5th Cir. 1976); *United States ex rel. Scranton* v. *New York*, 532 F.2d 292 (2d Cir. 1976). Abstention from the exercise of the habeas corpus jurisdiction is justified by the doctrine of comity, a recognition of the concurrent jurisdiction created by our federal system of government in the separate state and national sovereignties. Intrusion into state proceedings already underway is warranted only in extraordinary circumstances. Thus the doctrine of exhaustion of state remedies has developed to protect the state court's opportunity to confront initially and resolve constitutional issues arising within their jurisdictions and to limit federal judicial interference in state adjudicatory processes. This argument is especially forceful in a situation involving a speedy trial claim, because the drastic nature of the relief usually granted — dismissal of the case, *Strunk* v. *United States*, 412 U.S. 434 (1973) — could not be more disruptive of pending state actions.

The general argument against consideration of speedy trial habeas corpus petitions prior to exhaustion of state remedies is closely related to the doctrine that prevents appeal of adverse rulings on speedy trial motions. *United States* v. *MacDonald*, 435 U.S. 850 (1978). Although applied in the context of direct appeal from an order by a district court, much of the reasoning in *MacDonald* is relevant in that or pretrial habeas corpus as well. Among the reasons offered in *MacDonald* against pretrial appeal are that the claimed violation may be remedied by decision on the merits so that the right is not irreparably lost if review is postponed until final judgment is

rendered on the merits; and that an important factor developed in *Baker* v. *Wingo*, 407 U.S. 514 (1972), to determine whether the right to a speedy trial has been violated — a degree of prejudice suffered by the defense — cannot be adequately ascertained until after the trial has been completed. 435 U.S. at 856-61. These arguments are relevant in the context of collateral attacks as well as direct appeals and militate against a premature grant of habeas corpus relief.

These considerations, however, do not automatically resolve the question. We must distinguish between federal court orders dismissing state court cases on speedy trial grounds and federal orders requiring a prompt state trial. On occasion federal courts have, prior to trial, issued writs of habeas corpus ordering a prompt trial. The leading case on this point is *Braden* v *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), in which charges were pending in Kentucky against the petitioner, who was incarcerated in Alabama. Although Kentucky lodged a detainer against him, the state refused to attempt to effect his return in the near future and to grant him a trial as he had repeatedly requested. After it became evident that the state court would do nothing, the petitioner applied for habeas corpus relief, requesting that Kentucky be ordered to secure his presence for trial within sixty days or dismiss the indictment. The Supreme Court held that the application could be entertained despite the fact that it was brought prior to trial. It acknowledged that the petitioner could "assert a speedy trial defense when, and if, he is finally brought to trial." 410 U.S. at 489. But the Court continued,

> Petitioner does not, however, seek at this time to litigate a federal defense to a criminal charge, but

> only to demand enforcement of [Kentucky's] affirmative constitutional obligation to bring him promptly to trial. Smith v. Hooey, 393 U.S. 374 (1969). He has made repeated demands for trial to the courts of Kentucky, offering those courts an opportunity to consider on the merits his constitutional claim of the *present* denial of a speedy trial. Under these circumstances it is clear that he has exhausted all available state court remedies for consideration of that constitutional claim, even though Kentucky has not yet brought him to trial.

Id. at 489-90 (emphasis in original).

Thus the speedy trial clause protects two related but distinct interests: the enforcement of the state's duty to provide a prompt trial and the protection of defendants from the prejudice that arises from a state's failure to carry out that duty. As noted by the Fifth Circuit in *Brown* v. *Estelle, supra*, "[t]his distinction apparently turns upon the type of relief sought: an attempt to dismiss an indictment or otherwise prevent a prosecution" protects the defendant from prejudice and is normally not attainable by way of pretrial habeas corpus; but an attempt to force the state to go to trial may be made prior to trial, although state remedies must still be exhausted. 530 F.2d at 1283. When enforcing the state's duty, then, the exhaustion requirement does not necessitate a trial on the merits, as it usually does when a petitioner is claiming that his ability to defend at trial has been prejudiced. To require a petitioner to await completion of a trial before he may challenge the state's refusal to grant him one would be incoherent. The exhaustion requirement, therefore, is satisfied when the petitioner has availed himself fully of the state

machinery in attempting to have the state commence trial on the charges pending against him. As noted by the Supreme Court in *Braden*, this reformulation of the exhaustion requirement does not violate the underlying policies of federalism, for the state has the initial opportunity to consider the constitutional claim, and the relief requested will not "abort a state proceeding or . . .disrupt the orderly functioning of state judicial processes." 410 U.S. at 491. In this circumstance the concerns underlying *MacDonald's* disapproval of pretrial appeal of speedy trial motions are reduced as well. An attempt to enforce the state's duty to try petitioner promptly is sufficiently independent of the merits of the action that it may be considered separately; and the factor in *Barker* v. *Wingo, supra*, that is difficult to ascertain prior to trial — *i.e.* whether petitioner's defense has been prejudiced by the delay — assumes less significance.

With these considerations in mind, we ex mine Atkins' petition. The district court treated the petition as requesting dismissal and, without consideration of the exhaustion question, proceeded to an analysis in light of the *Barker* criteria. Finding that the delay was unreasonable and prejudicial to Atkins, the court granted a dismissal. The court erred in so doing. This disposition of the speedy trial claim runs afoul of the exhaustion requirement and the underlying concerns of federalism. Because Atkins has not yet been tried, the *Barker* prejudice criterion is indeterminate at this point, despite the district court's attempts to apply it, and available state avenues in which he can raise the claim that his speedy trial right has been violated have not been exhausted. In addition, no special circumstances

permitting pretrial habeas corpus consideration are present in this case. *Moore* v. *DeYoung, supra*, 515 F.2d at 442-43; *Frisbie* v. *Collins*, 342 U.S. 519 (1952).

This conclusion does not resolve the speedy trial issue, however. Atkins has presented alternative requests for relief, including that the state be ordered to grant him his right to a prompt trial. Under *Braden* this request may be considered by pretrial habeas corpus, provided the state courts have had an opportunity to resolve the issue. We find that Atkins diligently presented this constitutional claim in state court prior to his petition for habeas corpus and that, therefore, he exhausted his available state remedies. In August 1979 he moved the trial court to dismiss the indictment on speedy trial grounds or to release him on bail pending trial. At that point the trial court, of course, had not the authority to order the prompt trial of Atkins in order to enforce the state's constitutional duty to do so, because at that time the state Court of Appeals was considering the prosecution's interlocutory appeal and could not be ordered by a trial court to speed up its process. When the Court of Appeals, however, considered the prosecution's appeal of the trial court's release of Atkins on bail and when the Michigan Supreme Court decided whether to permit Atkins to appeal the revocation of bail, both courts had the opportunity to consider and were confronted by the specific argument, *Picard* v. *Connor*, 404 U.S. 270 (1971), that the state was violating its duty to grant Atkins a prompt trial. After the state Supreme Court denied Atkins leave to appeal, no state avenue remained open to him to press his claim. Application for a writ of habeas corpus in this situation to consider whether the state violated its duty is proper. *Braden; Brown* v. *Estelle, supra*.

B.

Turning to the merits of this speedy trial claim for a prompt trial, we focus primarily on the question of the reasonableness of the delay, that is, whether the state is justified in having failed to commence trial against Atkins promptly. The length of time involved here — fifteen months from arrest to decision by the state Court of Appeals on the interlocutory order — unquestionably is sufficient to trigger a speedy trial claim. The great bulk of this period was spent in the resolution of the interlocutory appeal resulting from the prosecution's pretrial motion filed on the day trial was originally to commence. Eleven months passed from the time the prosecution appealed the trial court's adverse decision on its motion until the state Court of Appeals handed down a decision, despite the fact that the appeal was ostensibly handled in an expedited fashion. The prosecution, of course, has the authority, and indeed the obligation, to press appeals in good faith, and we do not find that its decision to appeal arose from improper motives. The eleven month pretrial delay following the appeal, however, is unexplained. In a similar situation both the Michigan Supreme Court and the federal District Court for the Western District of Michigan have expressed the view that a violation of the right to a speedy trial can arise from the consumption of an excessive amount of time by the appeals court considering an interlocutory appeal. *People* v. *Chism*, 390 Mich. 104, 113, 211 N.W.2d 193 (1973); *Chism* v. *Koehler*, 392 F. Supp. 659 (W.D. Mich. 1975), *aff'd*, 527 F.2d 612 (6th Cir.), *cert. denied*, 425 U.S. 944 (1976). In the present case we find that the time spent on appeal, when added

to the previous four month delay, resulted in a violation of the duty of the state to bring Atkins promptly to trial.

At oral argument, the state has demonstrated a willingness to commence trial of this action, and given that the appeal of the interlocutory matter has since been completed, there seems to be no threat of further delay. Because a violation of the duty to try Atkins promptly has been found, however, we are constrained to order that his trial commence within sixty days, to guarantee that no further infringement of his right to a trial occur. If trial has not begun by the end of that period, the case against Atkins must be dismissed. This conclusion does not necessarily establish a violation of Atkins' right to a speedy trial warranting dismissal of the case against him. Only one element of that claim — the element of unreasonable delay — has been established. Another crucial element in such a claim, as discussed above, is the degree of prejudice suffered by a defendant, an element that can be accurately ascertained only after completion of the trial.

II.

We next must consider whether the revocation of bail by the state Court of Appeals on two occasions violated Atkins' constitutional rights. Atkins and the court below have focused upon the fourteenth amendment, arguing that the Court of Appeals behaved arbitrarily and capriciously in the manner in which it revoked bail, in violation of Atkins' right to due process of law. Thus although this isue concerns the right to liberty on bail pending trial, this is not an eighth amendment case. That amendment's statement that "[e]xcessive bail shall

not be required" has never been interpreted to require that all persons awaiting trial be released on bail. The states have the authority to determine that certain arestees are so dangerous to the community — because of either the nature of the crime with which they are charged or their propensity to flee before trial — that they may be denied bail and incarcerated. The crucial considerations in the present case are that "inherent in our American concept of liberty" in the general existence of the right to bail, *Mastrian* v. *Hedman*, 326 F.2d 708, 710 (8th Cir. 1964), and that if bail is denied, the denial must not violate the procedural standards developed from the due process clause *Id.* at 711; *United States ex rel. Shakur* v. *Comm'r of Corrections*, 303 F. Supp. 303 (S.D.N.Y.), *aff'd*, 418 F.2d 243 (2d Cir. 1969), *cert. denied*, 397 U.S. 999 (1970). Atkins' liberty interest is sufficiently urgent that as a matter of due process it cannot be denied without the application of a reasonably clear legal standard and the statement of a rational basis for the denial.

A.

Before we may consider this issue, we must once again determine whether a pretrial habeas corpus petition is a proper vehicle to raise the claim. The protection against unreasonable bail pending trial has been found by the federal courts to be one of the few rights, along with the right to be free of double jeopardy, *Abney* v. *United States*, 431 U.S. 651 (1977); *Gully* v. *Kunzman*, 592 F.2d 283 (6th Cir.), *cert. denied*, 442 U.S. 924 (1979), whose vindication may be asserted prior to trial, either by direct appeal of an adverse interlocutory order or by a petition for habeas corpus. *Stack* v. *Boyle*, 342 U.S. 1

(1951); *United States* v. *MacDonald*, 435 U.S. 850, 853-61 (1978). If asserted by way of habeas corpus, however, the petitioner must demonstrate that state remedies have been exhausted. Then, as in the case of federal review of the state's duty to afford a prompt trial under the speedy trial clause, consideration of the right to bail pending trial avoids the concerns militating against piecemeal appeal or federal interference in state criminal proceedings. The issue of whether the right to bail has been denied is collateral to and independent of the merits of the case pending against the detainee, and it is a right that, if not asserted immediately at the time is infringed, is irremediably lost. *Stack* v. *Boyle, supra*, at 12 (Jackson, J., concurring). *Cf. Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949) (presenting criteria for "collateral order" exception to general rule prohibiting piecemeal appeal). In addition, as in *Braden, supra*, if state courts have been offered an opportunity to confront the issue, then a petition to the federal courts prior to trial does not violate the values of federalism.

The present case in a narrow sense involves questions of due process, which usually may not be considered by way of pretrial habeas corpus. *Gully* v. *Kunzman, supra*, at 287-88. The due process questions, however, exist here only in connection with the right to bail pending trial — a right that must be defended immediately if it is to be protected at all. Accordingly, we may consider this portion of Atkins' petition at this time, provided he has exhausted available state remedies. *United States ex rel. Goodman* v. *Kehl*, 456 F.2d 863 (2d Cir. 1972); *United States ex rel. Shakur* v. *Comm'r of Corrections*, 303 F. Supp. 299 (S.D.N.Y. 1969); *United States ex rel. Covington* v. *Coparo*, 297 F. Supp. 203 (S.D.N.Y. 1969).

Atkins has claimed in the state courts that his right to bail pending trial was violated. On two occasions the state Court of Appeals cancelled, without a statement of reasons, the bond set by the trial court, and on both occasions Atkins sought leave to appeal to the Michigan Supreme Court, arguing that the Court of Appeals violated the Michigan Court Rules and acted arbitrarily by revoking bond in this manner. When leave was denied no avenue remained in the state court system. Atkins only recourse was to the federal courts by way of a petition for habeas corpus.

B.

We turn now to the merits of the bail issue. The Michigan Constitution and statutes provided that before conviction all persons shall be permitted release on bail, except in cases involving murder or treason "when the proof is evident or the presumption great." Mich. Const. Art. I, § 15; Mich. Stat. Ann. § 765.5. The Michigan Court Rules, promulgated by the state Supreme Court, provide that if a lower court's bail decision is reviewed, it "remains in effect and may not be vacated, modified, or reversed except on a finding of an abuse of judicial discretion." Rule 790.7(d). In Atkins' case the Court of Appeals twice cancelled the bond set by the trial court, giving reasons for the action on neither occasion. The parties and the court below have debated the possible reasons for the Court of Appeals' decisions: whether the presumption of guilt was great enough to warrant a refusal to set bond, whether jurisdiction reposed in the trial court to reinstate the bond revoked by the examining magistrate in February 1979, or whether the Court of Appeals might have found an abuse of discretion on the part of the trial court.

Such guesswork is improper. The lack of reasoning, the total silence of the Court of Appeals appears to constitute a violation of the Michigan Court Rules. *People* v. *Spicer*, 402 Mich. 406, 263 N.W.2d 256 (1978). It also constitutes an arbitrary denial of Atkins' fundamental interest in liberty pending trial and therefore violated his right to due process of law. Bail may not be denied arbitrarily. *Mastrian* v. *Hedman*, 326 F.2d 708 (8th Cir. 1964). Here bond was twice cancelled in cursory orders supplying no reasons. This renders any meaningful review impossible and violates the basic norms of judicial decisionmaking, which require that decisions generally be reached through reasoned argument, not by fiat. The fourteenth amendment does not permit such an important interest as that of liberty pending trial to be curtailed in so arbitrary a fashion. Reasons very well might exist to deny Atkins his freedom on bail while he awaits trial. We do not address this question. We state only that if his liberty is to be denied, it must be done pursuant to an adjudicatory procedure that does not violate the standards for due process established by the fourteenth amendment.

III.

Accordingly, the district court's dismissal of the case against Atkins is reversed, and the charges are reinstated. The trial, however, must commence within sixty days, or the case shall be dismissed. The order of Judg Evelyn Cooper releasing Atkins from custody on a $50,000 bond is reinstated, and Atkins shall remain at liberty according to the conditions thereof until trial commences, unless that order is vacated or modified in a manner consonant with due process.